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In the Supreme Court of the United States

OCTOBER TERM, 1984

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner challenges the court of appeals' affirmance of a Tax Court decision upholding the Commissioner's denial to it of tax-exempt status. The decision below is correct, does not conflict with that of any other circuit, and does not warrant review by this Court.

1. Petitioner was incorporated in Michigan in 1978 (Pet. App. B11). Petitioner originally sought converts through a pamphlet entitled "The Proof of Am," which explains the group's deistic beliefs (*id.* at B12). Subsequently, petitioner developed a new recruiting approach, which emphasizes to a great extent the alleged tax benefits of becoming an Ism of Am minister (*id.* at B13).

Petitioner awards degrees and titles to its converts upon their completion of various "Phases of Awareness" (Pet. App. B13-B14). For a donation of $25 ("Phase I"), one is

ordained a minister in the Ism of Am (*id.* at B14). Each new minister receives a copy of "The Book of Am," an Ism of Am key ring, a ministry certificate "ready for framing," and instructions for performing civil wedding ceremonies (*id.* at B14). For a donation of $75 ("Phase II"), the initiate receives a "Doctorate of Divinity degree," a "Legal Charter * * * complete with federal and state exempt numbers," and a pamphlet entitled "Untaxables I" (*id.* at B14-B15). For an additional donation of $50 ("Phase III"), one receives a "Certificate of Bishop" and a pamphlet entitled "Untaxables II." And for an added donation of $50 ("Phase IV"), one becomes a "Cardinal" and receives pamphlets entitled "Untaxables III" and "Share with Am." *Ibid.*

The instructional pamphlets accompanying each "Phase of Awareness" discuss, in great detail, the alleged tax benefits of being a minister in the Ism of Am. "Untaxables I," for example, provides a laundry list of personal expenses assertedly qualifying for the minister's housing allowance (Pet. App. B16). "Untaxables II" suggests deducting the costs of maintaining an automobile, on the theory that "you as the Minister are always seeking new members to 'Share With Am' everywhere you go" (*id.* at B17). "Untaxables III" advises that "there is a way * * * to significantly reduce the amount of withholding taxes taken from [your] paychecks" and that "[m]inistry in the Ism of Am is the answer" (*id.* at B18). "Orders of Law I" asserts that "[t]he wealthy families in this country have taken advantage of the tax laws * * * for more than two centuries" and that "[i]t is for this reason that we do not have to explain or defend our actions regarding the avoidance of taxes" (*id.* at B18-B19). A pamphlet entitled "Orders of Administration I" intones, "[r]un your business with businesslike finesse, and you'll never be the business of the IRS" (*ibid.*). And a "licensing examination" administered to Ism of Am recruiters (called "membership counselors") consists of 50 short-answer questions,

virtually all of which deal with some aspect of the federal tax laws (*id.* at B21).

Petitioner applied to the IRS for recognition of exemption from federal income tax as a "religious organization" under Section 501(c)(3) of the Code.[1] The Commissioner denied the application. He determined that petitioner was not operated exclusively for religious purposes, or for any other tax-exempt purpose, and that at least part of petitioner's earnings would inure to the benefit of private individuals (Pet. App. C17-C18).

After exhausting administrative remedies, petitioner sought review of the Commissioner's decision by filing this declaratory judgment action in the Tax Court.[2] That court sustained the Commissioner's determination (Pet. App. B9-B38). It accepted, for purposes of its decision, the sincerity of petitioner's religious beliefs and petitioner's description of its religious activities (*id.* at B12 n.4). The court determined, however, that, in addition to whatever religious purposes petitioner might have, it also had a substantial nonexempt purpose, which consisted of "counseling individuals, for specific 'donations,' on the purported tax benefits" that might be achieved by joining its organization (*id.* at B24). In this respect, the Tax Court found that the information petitioner disseminated was similar to (although not necessarily as accurate as) advice furnished by any commercial tax service, albeit within a narrower field and a

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2]Section 7428(a)(1)(A) of the Code permits an organization to seek a declaratory judgment concerning a determination by the Commissioner as to its "initial qualification or continuing qualification * * * as an organization described in section 501(c)(3)."

narrower class of customers (*id.* at B25).[3] The court denied petitioner's motion to supplement the administrative record with various oral declarations (*id.* at B1-B7). And it rejected petitioner's First Amendment arguments, holding that the government may legitimately decline to grant tax exemptions to organizations that fail to meet the qualifications set forth in Section 501(c)(3) (Pet. App. B22-B24, B27-B28, B31-B34). The court of appeals affirmed in a per curiam decision, "[b]ased upon the thoughtful and thorough opinion" of the Tax Court (*id.* at A1-A3).

2. Section 501(c)(3) provides that an organization "organized and operated exclusively for religious, charitable [or other specified] purposes" shall be exempt from federal income tax, provided that no part of its earnings inures to the benefit of any private shareholder or individual and that it engages in no prohibited political activity. A nonexempt purpose that is merely incidental does not disqualify an organization from tax exemption. However, a nonexempt purpose or activity that is "substantial" does disqualify it, regardless of how many exempt purposes the organization may have, or how important those exempt purposes may be. *Better Business Bureau* v. *United States,* 326 U.S. 279, 283 (1945); *Universal Oil Products Co.* v. *Campbell,* 181 F.2d 451, 464 (7th Cir.), cert. denied, 340 U.S. 850 (1950).

The Tax Court correctly upheld the Commissioner's denial of tax exempt status to petitioner because the administrative record disclosed that petitioner was operated

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[3]The Tax Court noted "the limited nature of [its] holding" in this respect, emphasizing that its reasoning applied "only to those organizations whose entire existence is permeated with the purpose of counseling taxpayers on tax matters," and that a charitable organization which discusses incidentally the tax consequences of donations by its contributors runs no risk of losing (or of failing to acquire) tax-exempt status (Pet. App. B34).

largely to dispense "tax information and advice as to methods of tax avoidance, if not downright tax evasion" (Pet. App. B35). This was obviously a substantial nonexempt purpose. The court of appeals concurred in that finding (*id.* at A3), and there is no reason for this Court to review that factual determination.

3. Petitioner does not appear seriously to question the findings of the courts below, but rather seems to challenge the government's right to deny it a tax exemption under any circumstances whatsoever. Petitioner contends (Pet. 5-10, 18-29, 50-57), for example, that the decision below unconstitutionally infringes its freedom of speech and free exercise of religion, on the theory that the IRS has singled it out for attack because of its "non-traditional" or "unorthodox" beliefs.

This contention is frivolous. It is settled that "tax exemption is a privilege, a matter of grace rather than right," and that denial of such a privilege does not deprive a taxpayer of First Amendment freedoms. *Christian Echoes National Ministry, Inc.* v. *United States,* 470 F.2d 849, 857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). See *Regan* v. *Taxation With Representation,* 461 U.S. 540 (1983). Nor can petitioner make out any colorable argument that the IRS or the courts below discriminated against it because of the content of its beliefs. The Tax Court accepted for purposes of its decision the sincerity of petitioner's religious beliefs, and it correctly pointed out that the IRS "denied petitioner's application for tax-exempt status, not because of petitioner's beliefs, but because of petitioner's substantial nonexempt purpose" (Pet. App. B32-B33). It could not seriously be contended (and petitioner does not contend)

that the dissemination of tax advice constitutes religious activity.[4]

4. Finally, petitioner objects to the Tax Court's refusal (Pet. App. B5-B6) to allow it to supplement the administrative record with certain additional documents. See Pet. 13, 16, 40-49. Rule 210(b)(1) of the Tax Court Rules defines the "administrative record" to include all documents submitted to the IRS and all written correspondence between the parties. The additional documents petitioner wished to submit to the Tax Court consisted of an internal IRS worksheet and a declaration signed by petitioner's founder purporting to summarize statements he made orally at a meeting with IRS officials (R. Doc. 12, Exhs. A, B and C). As the Tax Court correctly observed (Pet. App. B6-B7), such items do not qualify for inclusion in the administrative record as defined in Rule 210(b)(1). The principle that declaratory judgment actions under Section 7428(a) are to be decided on the basis of the administrative record carries out the intent of Congress and has been repeatedly affirmed. *Church in Boston* v. *Commissioner,* 71 T.C. 102, 105-106 (1978); *B.S.W. Group, Inc.* v. *Commissioner,* 70 T.C. 352,

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[4]Petitioner also asserts (Pet. 30-39) that the IRS has preferred similarly-situated religions over it. But it is clear that the Commissioner has a "vigorous enforcement policy against churches which overreach the conditions of their exemption" (*Church of Scientology* v. *Commissioner,* 83 T.C. 381, 453 (1984)), and the IRS pursues this policy even-handedly. Petitioner seems to ground its allegation of discrimination on the supposed fact that it is "similar to and * * * patterned after the Universal Life Church" (Pet. 11), which, in petitioner's words, "blatantly sells tax advice" (*id.* at 32). But the government has repeatedly resisted claims to tax exemption made by local units of the Universal Life Church. See *Universal Life Church, Inc.* v. *IRS,* 372 F. Supp. 770 (E.D. Cal. 1974); *Universal Life Church, Inc.* v. *United States,* 50 A.F.T.R.2d (P-H) ¶ 82-5108 (E.D. Cal. 1982); *Universal Life Church, Inc.* v. *Commissioner,* 691 F.2d 504 (8th Cir. 1982) (Table) (dismissing interlocutory appeal from the Tax Court).

358 n.3 (1978); *Christian Manner International, Inc.* v. *Commissioner,* 71 T.C. 661 (1979); *EST of Hawaii* v. *Commissioner,* 71 T.C. 1067 (1979), aff'd mem., 647 F.2d 170 (9th Cir. 1981) (Table); *Houston Lawyer Referral Service, Inc.* v. *Commissioner,* 69 T.C. 570, 575 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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